Supreme Court, U.S.
FILED
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(3) (3) (3)

Nos. 06-853, 06-865 and 06-1014

In the Supreme Court of the United States

CHEMTURA CANADA CO./CIE,
FKA CROMPTON CO./CIE,
FKA UNIROYAL CHEMICAL LIMITED, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

HERCULES INCORPORATED, PETITIONER

v.

UNITED STATES OF AMERICA

CHEMTURA CANADA CO./CIE,
FKA CROMPTON CO./CIE,
FKA UNIROYAL CHEMICAL LIMITED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
MATTHEW J. MCKEOWN
Acting Assistant Attorney General
JOHN T. STAHR
ROBERT H. OAKLEY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTIONS PRESENTED

Section 107(a)(1)-(4)(A) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9607(a)(1)-(4)(A), authorizes the United States to bring suit against various private parties, including "any person who by contract, agreement, or otherwise arranged for disposal * * * of hazardous substances owned or possessed by such person," to recover costs incurred in cleaning up contaminated property, and to proceed on a theory of joint and several liability. The petitions and conditional cross-petition present the following questions:

1. Whether the application of CERCLA to petitioners was unconstitutionally retroactive under the Fifth Amendment.

2. Whether the document setting forth the cancer potency factor that the Environmental Protection Agency used in selecting the appropriate remedial action at the contaminated site constituted a rule that should have been subject to notice and comment.

3. Whether petitioner Chemtura Canada Co./CIE was an "arranger" subject to CERCLA liability under Section 107(a)(3), 42 U.S.C. 9607(a)(3).

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (06-853 Pet. App. 1a-30a) is reported at 453 F.3d 1031. The opinion of the district court (06-853 Pet. App. 31a-80a) is reported at

364 F. Supp. 2d 941. An earlier opinion of the court of appeals (06-853 Pet. App. 81a-108a) is reported at 247 F.3d 706.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 2006. A petition for rehearing was denied on September 19, 2006 (06-853 Pet. App. 199a). The petition for a writ of certiorari in No. 06-853 was filed on December 18, 2006. The petition in No. 06-865 was filed on December 14, 2006, and was placed on this Court's docket on December 21, 2006. The conditional cross-petition in No. 06-1014 was filed on January 22, 2007 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, in response to the serious environmental and health dangers posed by property contaminated by hazardous substances. *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). The "two goals" of CERCLA, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, are "to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened" and "to hold responsible parties liable for the costs of these clean-ups." H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. 3, at 15 (1985).

Section 107(a) of CERCLA imposes liability for costs incurred in cleaning up contaminated property on four categories of "[c]overed persons"—typically known as potentially responsible parties (PRPs). 42 U.S.C.

9607(a). PRPs are defined as (1) owners and operators of facilities at which hazardous substances are located; (2) past owners and operators of such facilities at the time that disposal of hazardous substances occurred; (3) persons "who by contract, agreement, or otherwise arranged for disposal * * * of hazardous substances owned or possessed by such person[s]"; and (4) certain transporters of hazardous substances. See 42 U.S.C. 9607(a)(1)-(4); see also *Bestfoods*, 524 U.S. at 56 n.1 (noting that "[t]he remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup") (quoting *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 21 (1989) (plurality opinion)).

Under Section 107(a)(1)-(4)(A), persons that qualify as PRPs are liable for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan." 42 U.S.C. 9607(a)(1)-(4)(A).[1] Since the enactment of CERCLA, courts have consistently held that this language authorizes the enumerated governmental entities to bring suit against PRPs to recover their response costs, and to proceed on a theory of joint and several liability (except to the extent that PRPs can show that the alleged harm is divisible). See, *e.g.*, *New Castle County* v. *Halliburton NUS Corp.*, 111 F.3d 1116, 1121 (3d Cir. 1997). Another provision of CERCLA, Section 113(f)(1), provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under [Section 107(a)], during or

[1] The national contingency plan consists of regulations prescribing the procedure for conducting cleanups under CERCLA and other federal laws. See CERCLA § 105, 42 U.S.C. 9605; 40 C.F.R. Pt. 300.

following any civil action * * * under [Section 107(a)]." 42 U.S.C. 9613(f)(1).

2. This case concerns a massive cleanup operation at a herbicide and pesticide manufacturing plant in Jacksonville, Arkansas. Petitioner Hercules Incorporated (Hercules) purchased the plant in 1961 and operated it until 1971. During that time, Hercules manufactured various herbicides. In the process of manufacturing a herbicide known as trichlorophenoxyacetic acid (2,4,5-T), Hercules generated large amounts of 2,3,7,8-tetrachlorodibenzo-p-dioxin, a type of dioxin. 06-853 Pet. App. 3a-4a. "It is undisputed that dioxin is the most acutely toxic substance yet synthesized by man." *United States* v. *Vertac Chem. Corp.*, 489 F. Supp. 870, 876 (E.D. Ark. 1980).

During its operation and ownership of the plant, Hercules released dioxin into the environment in various ways. When Hercules purchased the plant, it buried thousands of drums containing pesticide and herbicide wastes. Hazardous substances from those drums, including dioxin, leaked into a nearby creek. Until 1964, Hercules discharged dioxin-contaminated wastewater into the same creek; Hercules then installed a holding basin to allow the contaminated wastewater to be pumped into the local sewer system, but the basin did nothing to remove the dioxin and frequently overflowed during heavy rainfalls. Hercules also extracted dioxin from its herbicides by using a solvent; that process produced a waste residue that Hercules placed in drums. Hercules left those drums sitting out, sometimes for months; during that time, waste containing dioxin often leaked from the drums. 06-853 Pet. App. 4a-5a, 36a-38a.

In 1971, Vertac Chemical Corporation (Vertac) leased the plant from Hercules; in 1976, Vertac pur-

chased it. Vertac continued to manufacture herbicides, including 2,4,5-T, and, in doing so, continued to generate dioxin. Like Hercules, Vertac stored drums containing dioxin-contaminated waste on the site. 06-853 Pet. App. 5a-6a, 39a.

Petitioner Chemtura Canada Company/CIE (Chemtura), then known as Uniroyal Chemical Limited, entered into an agreement with Vertac under which Vertac would formulate more than a million pounds of 2,4,5-T. In connection with that agreement, Chemtura supplied Vertac with 1,2,4,5-tetrachlorobenzene (TCB), a hazardous substance that was the key ingredient of 2,4,5-T. Chemtura had imported the TCB pursuant to temporary import bonds, in which it had declared that it was bringing the TCB into the country solely for processing and that it owned, and would continue to own, the TCB during the entire time it was in the country. Chemtura required Vertac to store the TCB separately and to provide insurance for it while it was stored at the site. In entering into the arrangement with Vertac, Chemtura understood, and the agreement specifically provided, that some of the TCB would be lost through waste and spillage and that the process for manufacturing 2,4,5-T from the TCB would generate dioxin that would require disposal. 06-853 Pet. App. 39a, 87a-88a, 169a-171a.

In 1979, Vertac stopped manufacturing 2,4,5-T. In 1980, the Environmental Protection Agency (EPA) issued a rule prohibiting Vertac from disposing of wastes contaminated with dioxin. 45 Fed. Reg. 32,676. Vertac continued to accumulate drums of waste from its production of herbicides. In 1987, Vertac abandoned the site; by that time, nearly 29,000 drums of waste were stored there. In conjunction with the Arkansas Department of

Pollution Control and Ecology, EPA undertook remediation efforts at the site (and at adjoining locations and two area landfills). 06-853 Pet. App. 6a-8a, 10a, 39a-43a, 46a.

3. As is relevant here, the United States filed suit against petitioners in the Eastern District of Arkansas, seeking to recover the costs of cleaning up the Jacksonville site (and the associated locations) under Section 107(a)(1)-(4)(A) of CERCLA. See 42 U.S.C. 9607(a)(1)-(4)(A).[2] The government alleged that Hercules was jointly and severally liable as an owner and operator of the Jacksonville facility at the time that disposal of dioxin occurred, see CERCLA § 107(a)(2), 42 U.S.C. 9607(a)(2), and as an "arranger" of the disposal of hazardous substances, see CERCLA § 107(a)(3), 42 U.S.C. 9607(a)(3). The government also alleged that Chemtura was jointly and severally liable as an "arranger." Petitioners brought cross-claims against each other for contribution under Section 113(f)(1). See 42 U.S.C. 9613(f)(1).

In 1993, the district court granted summary judgment to the government on its claim against Hercules, concluding that Hercules was jointly and severally liable both as an owner and operator under Section 107(a)(2) and as an "arranger" under Section 107(a)(3) and further concluding that Hercules had failed to show that the harm was divisible. 06-853 Pet. App. 9a, 90a. In 1997, after trial before an advisory jury, the district court determined that Chemtura was liable as an "ar-

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[2] The government also brought suit against various other parties, including Vertac. Vertac ultimately agreed to pay $10.7 million toward the cleanup of the site, and its shareholders agreed to pay an additional $3.15 million. *United States* v. *Vertac Chem. Corp.*, 756 F. Supp. 1215, 1217 (E.D. Ark. 1991), aff'd, 961 F.2d 796 (8th Cir. 1992).

ranger" under Section 107(a)(3). *Id.* at 154a-198a. The district court based that determination on its findings that (1) Chemtura owned the TCB it supplied to Vertac; (2) Chemtura retained an ownership interest in the TCB during its processing; (3) Chemtura owned the 2,4,5-T that was produced; (4) the generation of hazardous substances was "inherent" during the processing of the TCB; and (5) the processing by Vertac resulted in the release of hazardous substances. *Id.* at 177a.

The district court subsequently granted summary judgment to the government on the amount of costs it sought to recover from petitioners. 06-853 Pet. App. 109a-153a. As is relevant here, the district court rejected Hercules' claim that it should not have been liable for the cleanup costs associated with a nearby landfill site on the ground that the document that set forth the cancer potency factor used by EPA to calculate the risk from dioxin at the site constituted a rule that should have been subject to notice and comment. *Id.* at 129a-130a. The court reasoned that the document was "at most only a technical and advisory report," *id.* at 130a; that EPA's regional administrator "exercised discretion in deciding whether to apply the cancer potency factor to the cleanup of the site," *ibid.*; and that Hercules "had the opportunity to, and did, comment on EPA's application of the cancer potency factor with regard to cleanup levels at the site," *id.* at 131a.

The district court entered judgment in favor of the government against petitioners in the common amount of approximately $89 million (plus subsequent response costs and post-judgment interest). *United States* v. *Vertac Chem. Corp.*, 79 F. Supp. 2d 1034, 1035 (E.D. Ark. 1999). With regard to petitioners' contribution claims, the district court allocated 97.4% of the common

amount to Hercules and 2.6% to Chemtura, subject to offsets from any other PRPs. *Id.* at 1041.

4. On appeal, Chemtura contended, *inter alia*, that the district court erred by holding that it was liable as an "arranger" under Section 107(a)(3); Hercules contended, *inter alia*, that the district court erred by holding that it had failed to show that the harm was divisible. The court of appeals affirmed the judgment of liability against Chemtura, but reversed and remanded the judgment of liability against Hercules on the issue of divisibility. 06-853 Pet. App. 81a-108a.

With regard to Chemtura's argument, the court of appeals explained that, "[i]n deciding questions of arranger liability, we do not rely on bright-line rules but look to the totality of the circumstances to determine whether the facts of a given case fit within CERCLA's overwhelmingly remedial scheme." 06-853 Pet. App. 105a-106a (internal quotation marks and citation omitted). The court reasoned that this case was "nearly identical" to *United States* v. *Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989), in which it had declined to dismiss a similar CERCLA complaint. 06-853 Pet. App. 103a. The court of appeals observed that "[c]ontrol * * * is not a necessary factor in every case of arranger liability," *id.* at 104a; that the district court did not clearly err by finding that Chemtura owned the TCB throughout its processing, *id.* at 105a; and that, even if Chemtura had technically sold the TCB to Vertac, it was appropriate to "look beyond defendants' characterizations to determine whether a transaction in fact involves an arrangement for the disposal of a hazardous substance," *id.* at 106a (citation omitted).

With regard to Hercules's argument, the court of appeals concluded that the district court had applied the

incorrect legal standard in determining that Hercules had failed to show that the harm was divisible. 06-853 Pet. App. 100a-102a.

5. Chemtura filed a petition for a writ of certiorari, renewing its claim that it should not have been held liable as an "arranger" under Section 107(a)(3). See Pet. at 5-12, *Crompton Co./CIE* v. *United States*, No. 01-387. This Court denied review. 534 U.S. 1065 (2001).

6. On remand, after a lengthy evidentiary hearing, the district court again determined that Hercules had failed to show that the harm was divisible, except with regard to the harm caused at another nearby landfill site. 06-853 Pet. App. 31a-80a. As is relevant here, the district court rejected Hercules' contention that the application of CERCLA would be unconstitutionally retroactive under the Fifth Amendment because Hercules' liability would be "severe, unexpected, and grossly disproportionate to Hercules' conduct." *Id.* at 77a. The district court reasoned that "[t]he Eighth Circuit has previously held CERCLA to be constitutional," *id.* at 78a, and that other courts had consistently reached the same conclusion, both before and after this Court's decision in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998). 06-853 Pet. App. 78a. Accordingly, the district court concluded that "the application of CERCLA to hold Hercules liable in this instance is not unconstitutional." *Ibid.* After subtracting the costs associated with the excluded landfill site, the court subsequently reentered final judgment in favor of the government in the common amount of approximately $110 million (plus subsequent response costs and post-judgment interest). *Id.* at 10a.

7. The court of appeals affirmed. 06-853 Pet. App. 1a-30a.

The court of appeals first rejected various claims by Hercules, including challenges to the district court's determination that Hercules had mostly failed to show that the harm was divisible. 06-853 Pet. App. 11a-28a. As is relevant here, the court rejected Hercules' claim that it should not have been liable for the cleanup costs associated with the nearby landfill site on the ground that the document that set forth the cancer potency factor used by EPA to calculate the risk from pollution at the site constituted a rule that should have been subject to notice and comment. *Id.* at 25a-27a. The court of appeals agreed with the district court that the document was "at most a technical and advisory report * * * [and] did not obligate the agency or public in determining acceptable risks associated with dioxin," *id.* at 26a (citation omitted), and that "EPA considered Hercules' comments on the EPA's application of the cancer potency factor with regard to the cleanup levels at the site and responded to the comments in the final [records of decision]," *ibid.*

The court of appeals also rejected Chemtura's claim that it should not have been held liable as an "arranger" under Section 107(a)(3). 06-853 Pet. App. 29a. The court reasoned that it had addressed that issue in its previous opinion and that, because Chemtura had "pointed to no new controlling authority," its previous opinion was binding as the law of the case. *Ibid.*

Finally, the court of appeals rejected petitioners' claims that the application of CERCLA was unconstitutionally retroactive under the Fifth Amendment. 06-853 Pet. App. 29a-30a. The court reasoned that it had "previously resolved this exact issue" in *United States* v. *Dico, Inc.*, 266 F.3d 864 (8th Cir. 2001), cert. denied, 535 U.S. 1095 (2002), in which it had held, in the wake of this

Court's decision in *Eastern Enterprises*, that the application of CERCLA was not unconstitutionally retroactive. 06-853 Pet. App. 29a.

ARGUMENT

Petitioners contend (06-853 Pet. 15-19; 06-865 Pet. 13-24; 06-1014 Pet. 16-20) that the court of appeals erred by holding that the application of CERCLA was not unconstitutionally retroactive under the Fifth Amendment. Petitioners further contend (06-865 Pet. 24-30; 06-1014 Pet. 20-23) that the court of appeals erred by holding that the document that set forth the cancer potency factor used by the Environmental Protection Agency (EPA) in selecting the appropriate remedial action for the landfill site did not constitute a rule that should have been subject to notice and comment. In its petition (and in its conditional cross-petition to Hercules' petition), Chemtura also contends (06-853 Pet. 7-15; 06-1014 Pet. 8-16) that the court of appeals erred by holding that it was subject to CERCLA liability as an "arranger" under Section 107(a)(3). None of those contentions warrants further review.

1. Petitioners claim (06-853 Pet. 15-19; 06-865 Pet. 13-24; 06-1014 Pet. 16-20) that the court of appeals erred by holding that the application of CERCLA was not unconstitutionally retroactive under the Fifth Amendment. That claim lacks merit.

a. Petitioners do not assert that the court of appeals' decision conflicts with any decision of another court of appeals concerning the application of CERCLA. Nor could they, because, as the courts below noted (06-853 Pet. App. 29a, 106a-108a), the courts of appeals have consistently rejected retroactivity challenges to CERCLA. See *United States* v. *Alcan Aluminum*

Corp., 315 F.3d 179, 189-190 (2d Cir. 2003), cert. denied, 540 U.S. 1103 (2004); *United States* v. *Dico, Inc.*, 266 F.3d 864, 880 (8th Cir. 2001), cert. denied, 535 U.S. 1095 (2002); *Franklin County Convention Facilities Auth.* v. *American Premier Underwriters, Inc.*, 240 F.3d 534, 550-552 (6th Cir. 2001); *United States* v. *Olin Corp.*, 107 F.3d 1506, 1511-1515 (11th Cir. 1997); *O'Neil* v. *Picillo*, 883 F.2d 176, 183 & n.12 (1st Cir. 1989), cert. denied, 493 U.S. 1071 (1990); *United States* v. *Monsanto Co.*, 858 F.2d 160, 173 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989). Although petitioners assert (06-853 Pet. 19; 06-865 Pet. 18-20) that they were challenging the constitutionality of CERCLA only on an as-applied basis, they offer no explanation for how their claims differ from the claims that were considered, and rejected, in those cases.

b. Petitioners' primary contention is that the court of appeals' decision conflicts with this Court's decision in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998). That contention is unfounded.

In *Eastern Enterprises*, this Court considered a challenge to the Coal Industry Retiree Health Benefit Act of 1992 (the Coal Act), 26 U.S.C. 9701-9722. The Coal Act established a multi-employer lifetime health-benefit plan for coal miners, financed by annual premiums assessed against coal operators that had previously signed national wage agreements requiring contributions to benefit plans. *Eastern Enterprises*, 524 U.S. at 514-515 (plurality opinion). The plaintiff had operated a coal mine and signed national wage agreements, but ceased coal mining operations in 1966, before national wage agreements establishing lifetime health benefits had been signed. *Id.* at 515-516. Under the Coal Act, the plaintiff was obligated to pay premiums to cover the

health benefits of more than 1000 retired miners or their dependents who had worked for the company before 1966. *Id.* at 517. The plaintiff contended that the Coal Act violated substantive due process as applied to it, and effected an unconstitutional taking of its property without just compensation, by retroactively creating an obligation to finance the benefits of miners who, when employed by the plaintiff, had no expectation that they would receive lifetime health-care benefits at the plaintiff's expense. *Id.* at 517, 531.

The Court held that the application of the Coal Act to the plaintiff violated due process. A plurality of four Justices concluded that the application of the Coal Act effected an unconstitutional taking without just compensation. See *Eastern Enterprises*, 524 U.S. at 534-537. Applying a three-factor test drawn from the Court's regulatory-taking cases, the plurality concluded that, as applied to the plaintiff, the Coal Act had a substantial economic impact, interfered with reasonable investment-backed expectations, and constituted an unusual government action. *Id.* at 529-537. The plurality did not address the plaintiff's claim that the Coal Act violated substantive due process. *Id.* at 537-538. Justice Kennedy concurred in the judgment and dissented in part. He disagreed with the plurality's conclusion that the Coal Act should be analyzed as a taking, *id.* at 539-547, but concluded that the application of the Coal Act to the plaintiff violated substantive due process because the plaintiff "was not responsible for [the coal miners'] expectation of lifetime health benefits," which "was created by promises and agreements made long after [the plaintiff] left the coal business," *id.* at 550. Justice Breyer, joined by three other Justices, dissented. He also disagreed with the plurality's conclusion that the

Coal Act should be analyzed as a taking, *id.* at 554-559, but concluded that the application of the Coal Act to the plaintiff did not violate substantive due process because it was "not fundamentally unfair for Congress to impose upon [the plaintiff] liability for the future health care costs of miners whom it long ago employed," *id.* at 566.

Hercules contends (06-865 Pet. 14-18) that the court of appeals was *required* to analyze petitioners' claim under the three-factor test for analyzing regulatory taking claims applied by the plurality in *Eastern Enterprises*—and that, if it had, it would have concluded that the application of CERCLA to petitioners was unconstitutional. Far from commanding a majority of the Court in *Eastern Enterprises*, however, that mode of analysis was expressly rejected by five Justices. See 524 U.S. at 539-547 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 554-559 (Breyer, J., joined by Stevens, Souter and Ginsburg, JJ., dissenting). Instead, to the extent that a common principle emerges from the opinions supporting the judgment in *Eastern Enterprises*, it is that the application of the Coal Act to the plaintiff was constitutionally problematic because the plaintiff had left the coal industry before any collective bargaining agreement gave miners an expectation of lifetime health-care benefits. See *id.* at 530-531, 532, 535-536 (plurality opinion); *id.* at 549-550 (Kennedy, J., concurring in the judgment and dissenting in part).

When judged against that principle, the application of CERCLA to potentially responsible parties such as petitioners is fundamentally distinguishable from the application of the Coal Act in *Eastern Enterprises*, because there is a much closer nexus between the conduct of a potentially responsible party and the costs that are being imposed on it (which, in an action under Section

107(a)(1)-(4)(A), are costs incurred by the government in remediating harms from contamination for which the party is determined to be responsible). As one court of appeals has explained, "the background and purpose of the [Coal Act] differs greatly from that of CERCLA," because "Congress intended CERCLA to apply retroactively and acted purposefully to allocate the cost of hazardous waste cleanup sites to those who were responsible for creating the sites." *Dico*, 266 F.3d at 880 (internal quotation marks and citation omitted). The mere fact that a potentially responsible party may be held jointly and severally liable does not alter the analysis, especially in light of the fact that CERCLA provides mechanisms for dividing and allocating costs with other available potentially responsible parties—mechanisms that petitioners invoked in this case. See, *e.g.*, CERCLA § 113(f), 42 U.S.C. 9613(f).[3] Accordingly, even after this Court's decision in *Eastern Enterprises*, the courts of appeals have consistently concluded that the application of CERCLA to potentially responsible parties is not unconstitutionally retroactive. See *Alcan Aluminum Corp.*, 315 F.3d at 189-190; *Dico*, 266 F.3d at 880; *Franklin County*, 240 F.3d at 550-552.

Hercules contends (06-865 Pet. 21-23) that this Court should grant review because there is broader doctrinal uncertainty about the holding of *Eastern Enterprises*. To be sure, as Hercules notes (Pet. 21 & n.11), some

[3] Hercules repeatedly contends that the liability imposed on it was disproportionate because it was not responsible for Vertac's subsequent conduct at the Jacksonville site. See, *e.g.*, 06-865 Pet. 8-10, 16, 19 n.10. Both the district court and the court of appeals, however, rejected almost all of Hercules' claim that the harm was divisible (and that Hercules therefore should not be held liable for some portion of the costs incurred by EPA in cleaning up the site). See 06-853 Pet. App. 11a-28a, 46a-79a.

courts of appeals have concluded, after applying the analysis of *Marks* v. *United States*, 430 U.S. 188 (1977), that "no single rationale was agreed upon by the Court" in *Eastern Enterprises*. *Franklin County*, 240 F.3d at 552; see, *e.g.*, *Alcan Aluminum*, 315 F.3d at 189-190; *Anker Energy Corp.* v. *Consolidated Coal Co.*, 177 F.3d 161, 169-174 (3d Cir.), cert. denied, 528 U.S. 1003 (1999); *Association of Bituminous Contractors, Inc.* v. *Apfel*, 156 F.3d 1246, 1253-1258 (D.C. Cir. 1998). This case, however, would constitute a poor vehicle for resolving any such doctrinal uncertainty because, under any conceivable rationale on which a majority of the Court did agree, the application of CERCLA to potentially responsible parties such as petitioners would raise no constitutional difficulties. In any event, because there is no circuit conflict on the constitutionality of the retroactive application of CERCLA, further review on that question is unwarranted.

2. Petitioners further contend (06-865 Pet. 24-30; 06-1014 Pet. 20-23) that the court of appeals erred by holding that the document that set forth the cancer potency factor for dioxin used by the Environmental Protection Agency (EPA) in selecting the appropriate remedial action for the landfill site did not constitute a rule that should have been subject to notice and comment. That contention also lacks merit.

In general, cancer potency factors (also known as slope factors) constitute "[e]stimate[s] of the probability of response (for example, cancer) per unit intake of a substance over a lifetime." 40 C.F.R. Pt. 300, App. A, § 1.1. On a site-by-site basis, EPA uses cancer potency factors in establishing cleanup levels consistent with the national contingency plan (NCP). See 40 C.F.R. 300.430(e)(2)(i)(A)(2).

In holding that the document that set forth the cancer potency factor used by EPA in selecting the appropriate remedial action for the landfill site did not constitute a rule that should have been subject to notice and comment, the court of appeals applied the frequently cited two-part test articulated by the District of Columbia Circuit for distinguishing between legislative rules and policy statements, under which a court is required to consider (1) whether the statement at issue has binding effect and (2) whether it genuinely leaves the agency free to exercise discretion. 06-853 Pet. App. 25a-26a (citing *McLouth Steel Prods. Corp.* v. *Thomas*, 838 F.2d 1317 (D.C. Cir. 1988)). Applying that standard, the court reasoned the document was "at most a technical and advisory report * * * [and] did not obligate the agency or public in determining acceptable risks associated with dioxin," *id.* at 26a (citation omitted), and that "EPA considered Hercules' comments on the EPA's application of the cancer potency factor with regard to the cleanup levels at the site and responded to the comments in the final [records of decision]," *ibid.*

Petitioners do not contend that the court of appeals' decision to treat the document setting forth the cancer potency factor as a policy statement specifically conflicts with the decision of any other court of appeals concerning that document, nor do they contend that the court of appeals' test for distinguishing between legislative rules and policy statements more generally conflicts with the test used by any other court of appeals. Instead, petitioners seemingly contend only that the court of appeals *misapplied* that test because, "while parties were free to propose alternative potency factors, EPA announced that it would not consider them." 06-865 Pet. 24. Petitioners, however, fail to cite anything in the document

that set forth the cancer potency factor—*i.e.*, the guidance document issued by EPA in 1985—or in any other document that suggests that EPA intended that factor to be binding in all cases. The court of appeals, moreover, determined that EPA "considered Hercules's comments on the EPA's application of the cancer potency factor with regard to the cleanup levels at the site and responded to the comments in the final [records of decision]." 06-853 Pet. App. 26a. The mere fact that EPA has consistently used the same cancer potency factor (as one of many factors) "at every site at which dioxin affected remedial choices" (06-865 Pet. 24) in no way compels the conclusion that EPA has treated that cancer potency factor as binding; it could just as easily support the conclusion that the cancer potency factor is well-supported by scientific evidence (as reflected in the fact that there has been no prior litigation concerning EPA's choice of cancer potency factor). To the extent that petitioners claim that the court of appeals misapplied the test for distinguishing between legislative rules and policy statements, therefore, that claim lacks merit and in any event would not warrant further review.

3. Finally, Chemtura claims (06-853 Pet. 7-15; 06-1014 Pet. 8-16) that the court of appeals erred by holding that it was subject to CERCLA liability as an "arranger" under Section 107(a)(3). This Court denied review of that claim in an earlier petition, see Pet. at 5-12, *Crompton Co./CIE* v. *United States*, cert. denied, 534 U.S. 1065 (2001) (No. 01-387), and the same result is warranted here.

Chemtura asserts (06-853 Pet. 15) that there is a circuit conflict on the correct standard for liability as an "arranger." That assertion is incorrect. Instead, the courts of appeals have followed an intensely factual,

case-by-case approach in determining the application of "arranger" liability. They have observed that CERCLA does not define the phrase "otherwise arranged for disposal," 42 U.S.C. 9607(a)(3), and they have expressly rejected reliance on any "*per se* rule" in applying that term to the wide variety of factual situations in which it may come into play. *Florida Power & Light Co.* v. *Allis Chalmers Corp.*, 893 F.2d 1313, 1317-1318 (11th Cir. 1990).

In particular, the courts of appeals—like the court of appeals in this case, see 06-853 Pet. App. 104a—have refused to adopt a per se rule requiring a showing that the defendant controlled the disposal or treatment of hazardous substances in order to establish "arranger" liability. See, *e.g.*, *United States* v. *Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1232 (6th Cir. 1996); *United States* v. *TIC Inv. Corp.*, 68 F.3d 1082, 1087-1088 (8th Cir. 1995), cert. denied, 519 U.S. 808 (1996); *Catellus Dev. Corp.* v. *United States*, 34 F.3d 748, 752 (9th Cir. 1994). Instead, they have made clear that liability as an "arranger" hinges on a variety of factors peculiar to the particular transactions at issue. See, *e.g.*, *Morton Int'l, Inc.* v. *A.E. Staley Mfg. Co.*, 343 F.3d 669, 677-678 (3d Cir. 2003) (holding that "arranger" liability could be established by proof of "(1) ownership or possession; and (2) knowledge; *or* (3) control") (emphasis added).

To be sure, control over (or the authority to control) the waste disposal process may take on significance in situations in which the potentially responsible parties are not involved in a close business relationship that contemplates the use and disposal of hazardous substances. For example, in *General Electric Co.* v. *AAMCO Transmissions, Inc.*, 962 F.2d 281 (2d Cir. 1992), the plaintiff sought to hold several oil companies

liable as entities that arranged for the disposal of waste motor oil that was stored by dealers at service stations that the dealers leased from the oil companies. The court rejected the argument that the oil companies were liable as "arrangers" simply because they had the authority to control the manner by which their dealers disposed of waste oil, reasoning that "there must be some nexus between the potentially responsible party and the disposal of the hazardous substance." *Id.* at 286. In *General Electric*, there was no relationship at all between the defendants and the entity that disposed of the hazardous substances. Under those circumstances, the court concluded, the authority to control disposal was insufficient to provide the necessary connection for "arranger" liability. *Id.* at 287-288. Critically, the court distinguished *United States* v. *Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989), on the ground that "the oil companies did not own the hazardous substance, nor did they control the process by which waste motor oil was generated." *General Electric*, 962 F.2d at 287. The court therefore left open the possibility that, where, as here, the defendant retained ownership of chemicals during processing and knew that the processing of those chemicals would generate hazardous waste, the defendant could be liable as an "arranger" under Section 104(a)(3).

Similarly, in *South Florida Water Management District* v. *Montalvo*, 84 F.3d 402 (11th Cir. 1996), pesticide sprayers who had spilled hazardous chemicals on and around their airstrip filed a third-party complaint against the landowners who had contracted for their services. The court determined that the relationship between the sprayers and the landowners did not form a basis for "arranger" liability because "the Sprayers

have simply not alleged the Landowners had sufficient knowledge of *or* control over the Sprayers' disposal practices to be held liable." *Id.* at 409 (emphasis added). The court reaffirmed that courts must "reject[] any attempt to substitute a *per se* rule for the phrase 'arranged for,'" and should instead "focus on all of the facts in a particular case." *Id.* at 407. And like the Second Circuit in *General Electric*, the court determined that the instant case was distinguishable from *Aceto* because, "[i]n *Aceto*, the mixing and packaging of pesticides 'inherently' involved the creation of hazardous wastes such that the manufacturers should have expected the formulator would have to dispose of these wastes as part of the service they were purchasing." *Id.* at 408.

Here, the court of appeals correctly concluded that this case was analogous to *Aceto*. See 06-853 Pet. App. 103a. Like the defendants in *Aceto*, and unlike the defendants in *General Electric* or *South Florida*, Chemtura owned the pertinent hazardous materials throughout the manufacturing process and arranged for those materials to be processed in a manner that the Chemtura knew would generate wastes requiring disposal. *Id.* at 177a. Chemtura knew, moreover, that some of the hazardous materials it owned would be lost through waste and spillage. *Id.* at 170a. Chemtura thus knowingly participated in the fundamental chemical processing decisions that directly led to the improper disposal of hazardous waste. Where waste disposal is an inherent part of the process, as here and as in *Aceto*, the party who has arranged for the processing may be properly found to have arranged for the accompanying disposal of the resulting hazardous wastes. Chemtura fails to identify any conflict among the courts of appeals that warrants this Court's review.

CONCLUSION

The petitions and conditional cross-petition for writs of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
MATTHEW J. MCKEOWN
Acting Assistant Attorney General
JOHN T. STAHR
ROBERT H. OAKLEY
Attorneys

MARCH 2007